Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

In The

SUPREME COURT
OF THE UNITED STATES

October Term, 1988

CHARLES MEBANE
Petitioner,
v.

STATE OF CONNECTICUT
Respondent.

ON WRIT OF CERTIORARI
TO APPELLATE COURT OF
THE STATE OF CONNECTICUT

PETITION FOR CERTIORARI

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With Whom On This
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A. QUESTION FOR REVIEW

Is a criminal statute unconstitutional if it makes mere knowledge without any action a crime?

B. LIST OF PARTIES

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

A.	Question For Review	i
B.	List Of Parties	i
C.	Table Of Authorities	iii
D.	Reference To The Official And Unofficial Reports	1
E.	Statement Of The Grounds On Which Jurisdiction Is Invoked	1
i.	Date and Time of Judgment and Decree	1
ii	Date of Extension	2
iii	Statutory Provision Conferring Jurisdiction	2
F.	Constitutional Provisions And Statutes Involved	3
G.	Statement Of The Case	6
H.	Statement Of The Case Regarding When Federal Constitutional Issue First Raised In State Court	17
I.	Argument	26
K.	Appendix (see page 1a for Appendix Table of Contents)	1a

C. TABLE OF AUTHORITIES

CASES

1. Brown v. Ohio
432 U.S. 161, 97 S. Ct. 2221,
53 L. Ed. 2d 187 (1977) 28

2. Dunn v. United States
442 U.S. 100, 99 S. Ct. 2190,
60 L. Ed. 2d 743 (1979) 44

3. Harris v. Reed, No. 87-5677
__U.S.__, 109 S. Ct. 1038 (1989) 26

4. Liparota v. United States
471 U.S. 419, 105 S. Ct. 2084,
85 L. Ed. 2d 434 (1985) 31

5. Mullaney v. Wilbur,
421 U.S. 684, 95 S. Ct. 1881,
44 L. Ed. 2d 508 (1975) 43

6. Powell v. State of Texas
392 U.S. 514, 88 S. Ct. 2145,
20 L. Ed. 2d 1254 (1968) 34

7. Robinson v. State of California
370 U.S. 660, 82 S. Ct. 1417,
8 L. Ed. 2d 758 (1962) 28,29,33,34, 46

8. Sawyer v. Sandstrom
615 F2d 311 (CA5, 1980) 37

9. Scales v. United States
367 U.S. 203, 81 S. Ct. 1469,
6 L. Ed. 2d 782 (1961) 35,36, 46

10. Schad v. Borough of Mount Ephraim
452 U.S. 61, 101 S. Ct. 2176,
68 L. Ed. 2d 671 (1981) 28

11. Smith v. California
361 U.S. 147, 80 S. Ct. 215,
4 L Ed. 2d 205 (1959) 30

12. Stanley v. Georgia
394 U.S. 557, 89 S. Ct. 1243,
22 L. Ed. 2d 542 (1969) 32,39

13. State v. Evans
165 Conn. 61, 327 A2d 576 (1973) 22,23

14. State v. Mebane
17 Conn. App. 243, 551 A2d 1268
(1989) 1

15. Ulster County Court v. Allen
442 U.S. 140, 99 S. Ct. 2213,
60 L. Ed. 2d 777 (1979) 26,41,46

16. United States v. Anton
683 F2d 1011 (CA7, 1982) 31

17. United States v. Bailey,
444 U.S. 394, 100 S. Ct. 624,
62 L. Ed. 2d 575 (1980) 30,31

18. United States v. Johnson
513 F.2d 819 (CA2, 1975) 37

19. United States v. Soto
716 F.2d 989 (CA2, 1983) 37

FEDERAL CONSTITUTIONAL PROVISIONS

1.	Second Amendment	4,38
2.	Fifth Amendment	4,29,35
3.	Sixth Amendment	5
4.	Eighth Amendment	6
5.	Fourteenth Amendment	6,18,30 34,44

CONNECTICUT GENERAL STATUTES

Section 29-38	3,7,26

FEDERAL STATUTES

28 U.S.C., Sec. 1257(a)	3

MISCELLANEOUS

1.	American Heritage Dictionary of the English Language	21
2.	Black's Law Dictionary	21
3.	LaFave and Scott, Substantive Criminal Law	30,31,32,38

4. Rogers College Thesaurus 22

5. Webster's Third New International Dictionary 21

6. Wharton's Criminal Law 30

D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

The Connecticut Appellate Court's decision is reported in 17 Conn. App. 243, 551 A2d 1268 (1989) (App. pp. 2a-14a). The Connecticut Supreme Court's denial of the Petitioner's subsequent Petition For Certification is reported in 210 Conn. 811 (1989) (App. p. 15a).

E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKE

i Date and Time of Judgment and Decree

The Connecticut Appellate Court's decision affirming the Petitioner's conviction was released on January 3,

1989 in the official reports with no specific time of entry. The Petitioner's subsequent Petition For Certification was denied by the Connecticut Supreme Court on February 9, 1989 with no specific time of entry.

ii Date of Extension

On March 6, 1989, in Application No. A-697, Thurgood Marshall, Associate Justice of the Supreme Court of the United States granted Petitioner's Motion For Extension Of Time To File Petition For Writ Of Certiorari, and extended the time for filing this present Petition until May 19, 1989.

iii Statutory Provision Conferring Jurisdiction

The Statutory provision which confers on this Court the jurisdiction to review the judgment in question is 28 U.S.C., Sec. 1257(a) (At an earlier time, this present matter would have been raised as an appeal concerning an unconstitutional state statute but the recent amendment to 28 U.S.C., Sec. 1257 disallows direct appeals concerning such matters).

F. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The state statute upon which the Petitioner was convicted and which the Petitioner claims is unconstitutional, is Conn. Gen. Stat., Sec. 29-38 which states that:

"Any person who knowingly has, in

any vehicle owned, operated or occupied by him, any weapon for which a proper permit has not been issued as provided in section 29-28 on or section 53-206, or has not registered such weapon as required by section 53-202, as the case maybe, shall be fined not more than One Thousand Dollars or imprisoned not more than five years or both . . . . ." (emphasis added) (the remaining portion of the statute is not in question but it is produced in the attached Appendix, pp. 24a-25a, as part of the entire statute).

The Federal Constitutional provisions are the following:

AMENDMENT II.

Right to bear arms

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise

infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII.

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

G. STATEMENT OF THE CASE

The Petitioner was charged in an Amended Information filed on June 12, 1987, with a violation of Conn. Gen.

Stat., Sec. 29-38 (App. p. 24a-25a). At the trial, New Haven Police Officer Philip **Beamon** testified on direct examination for the Prosecution that on December 7, 1986 at about 1:00 a.m., he observed a motor vehicle parked in the middle of a New Haven Street with the engine running for about ten (10) minutes. The operator inside the vehicle was conversing with several females standing across the street. He approached the vehicle and asked the operator, who was the Petitioner, for his license and registration. He told the operator that he was going to give him a summons for improper parking. Such a summons does not require taking a person into custody. At this time, he noted that the vehicle contained four (4) males consisting of the driver, a

front seat passenger and two (2) rear seat passengers (Trial transcript covering June 16, 1987 to June 19, 1987, hereafter referred to as T, pp. 123-128).

The driver (the Petitioner) appeared nervous (T., p. 126). As he was writing the ticket on the roof of the car outside the driver's door, he saw the hand of the driver go between his legs, pass the cushion area of the seat and extend to about six (6) inches or so from the floorboard. He then scanned the general area of the car with his flashlight and saw what appeared to be a handle of a gun on the floor. He then drew his service weapon and yelled to another officer that there was a gun in the car. He ordered all of the

occupants out of the car (T., pp. 128-131). He then searched below the driver's seating area and removed a gun, which was marked as State Exhibit A (T., pp. 131-132, 136).

On cross examination, Beamon testified that he arrested not only the Petitioner but the other three passengers for the charge of having a weapon, State Exhibit A, in a motor vehicle (T. pp. 143-146). The Petitioner never touched the gun but made a "suspicious" movement toward it. It was possible that the Petitioner's said movement was merely one of scratching his legs (T. p. 152). He did not know if the rear passengers had put the gun under the Petitioner's seat. He did not know if the Petitioner brought

the gun into the car or whether the Petitioner even knew it was there (T., p. 156).

After the prosecution rested, Frank Truhowsky testified on direct examination for the **Defense** that he was a retired police lieutenant in the City of Bridgeport. For seventeen (17) years he was the officer in the identification division concerned with crime scenes, photographs and fingerprints. His duties regarding fingerprints involved lifting latent print impressions (by using dusting powder), preserving those latent prints and comparing them with the fingerprint impressions taken from arrested persons. He testified that anybody who is arrested for a crime is then generally so fingerprinted. Said

fingerprint impressions are placed on cards and kept in files. By comparing latent impressions taken from an object with said fingerprint cards of an arrested person, it can be determined if the arrested person had touched the object. The best object from which to take a latent print is an object with a smooth surface such as glass or metal (T. pp. 210-213).

He then was shown State Exhibit A, which was the weapon introduced by the Prosecution. He noted that it was made of metal with a plastic handle. There were areas on said weapon which would hold a latent fingerprint impression (T. p. 213). Latent prints could have been taken off State Exhibit A when it was

taken by the police on December 7, 1986, and then could have been compared with inked impressions of the people who had been arrested. By making such a comparison a determination could have been make as to whether an arrested individual had handled or touched the gun (T. pp. 233-234).

In its Request to Charge, dated June 18, 1987, pp. 2-3, the Prosecution asked the court to instruct the jurors that it need not prove that the Petitioner possessed the weapon but only need prove that he was aware that the weapon was in the car. The Prosecutor initially argued to the jury that the lack of fingerprints was unimportant since the charges did not concern having

contact with the weapon. The Prosecutor argued that there was no element of the charge regarding possession or actual possession. He argued that the "only question is a very simple one and that is this: was the Defendant aware that that (sic) gun was in the car? That's the only question. It's the only charge in the case" (T. pp. 262-263). The Prosecutor argued that "even if this gun was in someone else's pocket in the car", another person who just knew about it would still be guilty (T. p. 266).

Petitioner's counsel argued to the jury that a passenger in the back seat could easily have slid the gun under the Petitioner's seat when that passenger saw the police approaching (T. p. 273). Petitioner's counsel argued that if the

police had performed fingerprint testing then they could have found that one of the passengers had left their prints on the weapon rather than the Petitioner. He argued that lack of such proof regarding fingerprints meant that the Prosecution had not met its burden of proof (T. p. 275).

In rebuttal, the Prosecutor argued that fingerprints were unimportant and that the Defense was trying to twist the charge and make it one involving possession. Petitioner's counsel objected to the Prosecutor so arguing the law. Petitioner's counsel stated that the Prosecution was inaccurate in its said argument to the jury that the crime did not involve possession. The Court noted it would charge the jury on

the law and overruled the objection and granted an exception (T. p. 279-280). The Prosecutor then immediately argued that "this is not a possession offense. Not a possessory offense" and that lack of fingerprint evidence was unimportant (T. p. 280).

The trial court then instructed the jury that the Prosecution need not prove that the Defendant had "the weapon upon his person or even within his reach." Regarding the statutory element that a defendant 'has the weapon', the court instructed the jury that said element has "little at all to do with the concept of physical possession, because under the statute, a jury could find a person has a weapon in a vehicle even when the weapon is owned or even in the

physical possession of another occupant . . . .(I)n order to find the Defendant guilty, you need not find that the Defendant was in actual possession of the weapon or that he was the owner or the initial carrier of the weapon. The question you should ask yourself is, was the Defendant aware of the fact that the weapon was in the vehicle?" (T. pp. 301-302, App. pp. 18a-19a). "(T)he statute at issue is violated by any occupants of a vehicle who are aware of the existence of a weapon in the vehicle." (T. p. 304, App. p. 23a) (emphasis added).

Petitioner's counsel took an exception to the court not instructing the jury pursuant to his Request To Charge, dated June 18, 1987, p. 3, which

requested an instruction that the Prosecution "must prove that the defendant 'knowingly' had a weapon in the motor vehicle he was operating and occupying. 'Knowingly' is defined as willfully, consciously or intentionally" (T. p. 312).

The Petitioner was found guilty on June 19, 1987 (T. p. 316). The Court sentenced the Petitioner to five (5) years, execution suspended after four (4) years. (Transcript, July 31, 1987, pp. 13-14).

H. STATEMENT OF THE CASE REGARDING WHEN FEDERAL CONSTITUTIONAL ISSUE FIRST RAISED IN STATE COURT

In his brief to the Connecticut

Appellate Court, filed January 29, 1988, pp. 8-21, (said pages 8-21 are reproduced in the attached **Appendix**, pp. 26a-55a), the Petitioner argued for the first time that the due process clause of the Fourteenth Amendment to the United States Constitution requires every criminal statute to have an act component, and that the present statute did contain an act component consisting of the act of a defendant himself having or constructively possessing a weapon in a motor vehicle. The Petitioner argued in said brief that the statute was thus constitutional as written but was unconstitutionally interpreted by the trial court in its jury instructions which eliminated the act component. Said trial court instructed the jury that the statute did not require the

Prosecution to prove that the Petitioner acted or possessed the weapon but only needed to prove that the Petitioner was **aware** of the weapon's presence in the car even if it was possessed by someone else in the car (App. pp. 18a-19a, 23a).

To demonstrate that the trial court's interpretation was wrong, the Petitioner in his brief to the Connecticut Appellate Court, pp. 12-14 (App. pp. 34a-39a), outlined the principles of statutory construction. He stated that a statute should be interpreted according to the federal constitution and should be strictly construed according to the common law. He argued the general rule of strict construction and the rule of lenity in favor of a defendant. He argued that

every word of a staute has meaning and that when a word is not defined in the statute then it should accorded the common definition given in a dictionary.

In said brief pp. 14-19, (App. pp. 39a-49a) the Petitioner argued that under the common law every crime had two components - an evil mind (mens rea) and an evil hand (actus reus). He argued that the due process clause of the United States Constitution would allow legislatures to enact a strict liability statute without the mens rea component, but the due process clause would not allow legislatures to enact a statute without the act component which could consist of an act or a failure to act when the law clearly expressed a duty to

act. He argued that the federal constitution prohibits crimes based on mere association with others or mere presence at the scene of a crime.

The Petitioner argued in his Connecticut Appellate Court brief, pp. 19-21, (App. pp. 49a-54a) that the present statute was constitutional because it contained an act component of some type of possession by the Petitioner. He argued that the statute focuses on the words that it is a crime when any person "knowingly has . . . any weapon". He argued that the word 'has' (or have) is commonly defined in all the dictionaries as a word meaning to possess. See Black's Law Dictionary, Webster's Third New International Dictionary, American Heritage

Dictionary, Rogers College Thesaurus. He argued that such a common interpretation of the statute according to the dictionaries would prohibit not just exclusive (actual) possession but would also prohibit joint (constructive) possession. He concluded that the trial court's interpretation eliminating the act of some type of possession was an interpretation that violated the Petitioner's said federal constitutional right to due process.

In his said brief to the Appellate Court, pp. 8-11 (App. pp. 26a-33a) the Petitioner sought a review of the issue pursuant to State v. Evans, 165 Conn. 61, 70, 327 A2d 576,(1973) which allowed appellate review of constitutional issues not raised at trial. The

Appellate Court noted that the Petitioner was claiming that "the erroneous instruction violated his constitutional rights because the state was relieved of proving an essential element of the offense. Although the defendant took no exception to the instruction he now challenges, we will review his claim under the 'exceptional circumstances rule of State v. Evans", supra. (App. pp. 7a-8a) (emphasis added).

The Appellate Court, after conceding that the Petitioner's interpretation of the statute prohibited both actual and constructive possession, went on to affirm the trial court's interpretation eliminating any type of possession, (App. pp. 7a-10a). The

Appellate Court ruled that the "statute is not concerned with possession or ownership of a weapon but rather aims to penalize those who know that there is a weapon inside the vehicle. To read the requirement of possession into the statute would unnecessarily limit the scope of the statute" (App. pp. 9a-10a). (emphasis added). The Petitioner repeated the unconstitutional interpretation of the statute issue in his Petition For Certification, pp. 1-9, filed with the Connecticut Supreme Court on January 20, 1989. That Petition was denied on February 9, 1989 (App. pp. 15a-16a).

Since the Connecticut Appellate Court gave a full review of the federal constitutional issues raised in the

Petitioner's brief to that Court, then this Court has jurisdiction to review those same issues which are now being raised in this present Petition. The Connecticut Appellate Court never clearly and expressly stated that it was affirming the Petitioner's conviction based on his failure to raise the issue at the trial level. On the contrary, the Appellate Court stated (App. pp. 7a-8a) that it was waiving the procedural bar and giving a full review of the Petitioner's constitutional claim presented in his Brief (See App. pp. 26a-55a). The Appellate Court summarized the Petitioner's argument as being a claim that the trial court's instruction unconstitutionally eliminated an "essential element of the offense" (App. pp. 7a-8a). Thus, this

Court has jurisidiction to review this claim. See Harris v. Reed, No. 87-5677, ___U.S.___, 109 S. Ct. 1038 (1989), Ulster County Court v. Allen, 442 U.S., 140, 147-154, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

I. ARGUMENT

The Petitioner was charged with a violation of Conn. Gen. Stat., Sec. 29-38 (App. pp. 24a-25a) which prohibits a citizen from knowingly having a weapon in a motor vehicle. The Connecticut Appellate Court rejected the Petitioner's constitutional arguments, and construed the statute to have no act, or failure to act component, but only a mens rea or mere knowledge component. The Appellate Court which

had noted that three other people were in the car with the Petitioner, ruled that the trial court's interpretation was correct and that the "statute is not concerned with possession or ownership of a weapon, but rather aims to penalize those who know that there is a weapon inside a motor vehicle"(App. pp. 9a-10a) (emphasis added). The Connecticut Supreme Court denied a Petition For Certification (App. pp. 15a-16a). The Connecticut courts have in this case interpreted this penal statute in such a way as to eliminate the statute's constitutionally required actus reus component and have left the statute with only a mens rea component allowing a conviction to be based solely on a citizen's mere knowledge that someone else in the car had a weapon.

This Court is not free to correct any misinterpretation of a state statute by state courts but must deal with the state court's interpretation as if the state court actually rewrote the statute. "The instruction of the trial court, implicitly approved on appeal, amounted to a ruling on a question of state law that is as binding on us as though the precise words had been written into the statute (citation omitted). We can only take the statute as the state courts read it (citation omitted)" Robinson v. State of California, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed 2d 758 (1962). In Brown v. Ohio, 432 U.S. 161, 163-164, 167, 97 S. Ct 2221, 53 L. Ed. 2d 187 (1977) and Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 101 S. Ct. 2176,

, 68 L. Ed. 2d 671 (1981), the highest court of each state denied review of a lower state appellate court's interpretation of a state statute and this Court ruled that it was bound by the interpretation provided by such lower state courts. In Robinson, supra, this Court noted that a California statute could have been construed constitutionally as requiring the actual use or touching of the contraband (narcotics) but since the state court had not so construed the statute, then the statute itself was unconstitutional. supra 370 U.S. at 666-667.

The present statute which has no act component and which makes mere knowledge a crime violates the due process clause of the Fifth and

Fourteenth Amendments to the United States Constitution. Under common law, there is no crime unless there is the coupling of the evil meaning mind with the evil doing hand. United States v. Bailey, 444 U.S. 394, 402, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), Wharton's Criminal Law, 14th Edition, Vol. 1, Chap 3, p. 115, La Fave and Scott, Substantive Criminal Law, Chap 3, Sec. 3.2(b), p. 273. Thus under common law, a crime contains two (2) components - a mental state (mens rea) and an act (actus reus) which is a product of that mental state. The constitution allows legislatures to enact strict liability criminal statutes which do not have a mens rea component. See United State v. Bailey, supra 444 U.S. at 404, fn 4, Smith v. California, 361 U.S. 147, 150,

80 S. Ct. 215, 4 L Ed. 2d. 205 (1959), Liparota v. United States, 471 U.S. 419, 426, 105 S. Ct. 2084, 85 L Ed 2d 434 (1985). Although such strict liability statutes eliminating mens rea are allowable, they usually only carry light penalties. See United States v. Bailey, supra 444 U.S. at 404, fn 4, United States v. Anton, 683 F2d 1011, 1016-1017 (CA7, 1982), LaFave and Scott, supra, sec. 3.8, pp. 340-341. However, the due process clause of the federal constitution prohibits legislatures from creating penal statutes which do not have an act component.

> "Bad thoughts alone cannot constitute a crime, there must be an act, or an omission to act where there is a legal duty to act. Thus the common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined . . .The common law crimes all

> require an act or omission in addition to a bad state of mind. A statute purporting to make it criminal simply to think bad thoughts would in the United States be held unconstitutional. And a statute which is worded vaguely on the question of whether an act (or ommision), in addition to a state of mind, is required for criminal liability will be construed to require some act (or omission)" LaFave and Scott, supra, Sec. 3. 2, 3. 2, (b) pp. 272-274 (emphasis added).

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds . . . . (The government) cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts . . . . (The individual has a fundamental) right to read or observe what he pleases" Stanley v. Georgia, 394 U.S. 557, 565, 566, 568, 89 S. Ct. 1243, 22 L. Ed 2d 542

(1969) (emphasis added). This Court noted that such penal statutes prohibiting thoughts are "not justified by the need to ease the administration of otherwise valid criminal laws" Id at 568. Thus the government's legitimate need to control the violence caused by guns does not justify its attempt to make it a crime to be aware of some else's possession of such weapons.

This Court in referring to Robinson v. State of California, supra, has stated that under the federal constitution "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical

common law terms, has committed some **actus reus**" Powell v. State of Texas, 392 U.S. 514, 533, 88 S. Ct 2145, 20 L. Ed. 2d. 1254 (1968) (emphasis added). In Robinson v. State of California, supra 370 U.S. at 667, this Court ruled that a "state law which imprisons a person thus afflicted (with narcotic addiction) as a criminal even though he has never **touched** any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the (due process clause of the) Fourteenth Amendment" (emphasis added). This Court ruled that the constitution does not allow a person to be punished for his "status" involving narcotics,and rejected an argument that a person could be punished who never

"used or possessed any narcotics, within the State" Id at 666. (emphasis added)

> "In our jurisprudence, guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . ., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment" Scales v. U. S., 367 U.S. 203, 224-225, 81 S. Ct. 1469, 1484, 6 L. Ed. 2d 782 (1961) (emphasis added).
>
> This Court in Scales noted that there must be:
>
> "an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability . . . . What must be met then, is the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization's

criminal activity . . . ." 367 U.S. at 226, 227 (emphasis added).

The Court noted that in

> "an area of the criminal law which this Court has indicated more than once demands its watchful scrutiny (citations omitted), these (above) factors have weight and must be found to be overborne in a total constitutional assessment of the statute. We think, however, they are duly met when the statute is found to reach only 'active' members having also a guilty knowlege and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise unaccompanied by any significant action in its support or any committment to undertake such action," supra 367 U.S. at 228, (emphasis added).

It has been observed that "Scales thus teaches that knowing association with a group cannot be made a punishable act just because some of the group members are engaged in criminal

conduct," Sawyer v. Sandstrom, 615 F2d 311, 317 (CA 5, 1980) (emphasis added). "Guilt may not be inferred from mere association with a guilty party" United States v. Johnson, 513 F2d 819, 824 (2d Cir, 1975). Stated in another way, "mere presence at the scene of the crime, even when coupled with the knowledge that at that moment a crime is being committed" there is not sufficient to establish guilt. Id at 823. See United States v. Soto, 716 F2d 989, 991 (2d Cir. 1983).

It is possible that a statute can be constitutional which prohibits not an action but a failure to act. However, for "criminal liability to be based on a failure to act, it must first be found that there is a duty to act--a legal

duty and not simply a moral duty," LaFave and Scott, supra, Sec. 3.3(a), p. 283. Naturally this duty to act must be expressed in some law for it to rise to a legal duty. There is no law that states that weapons are 'malum in se' or that a person must flee a vehicle once he learns that a weapon is in the vehicle, but rather there are constitutional provisions which actually protect the right to have weapons. Article First, Section 15 of the Connecticut Constitution states that "Every citizen has a right to bear arms in defense of himself and the state". See also the Second Amendment to the United States Constitution, infra p. 4. It must be remembered that no state can base a criminal prosecution on the exercise of a constitutional right. See

Stanley v. Georgia, supra, 394 U.S. at 568.

Considering these existing constitutional protections of the right to bear arms, no citizen should be told ex post facto that he had a duty which contradicts and supercedes these constitutional rights and which mandated that he either not enter the car if he knew a gun was present or flee the car immediately after learning that someone else possessed a weapon. There is no such law. The trial court never instructed the jury that there was such an element of failure to flee nor did the Appellate Court construe the statute as containing such an element of a failure to act. The Connecticut courts have construed the statute as containing

only an element of mens rea consisting of mere knowledge and not containing an element of an act or failure to act. (App. pp. 7a-10a).

There is no precise precedent declaring that a penal statute would be unconstitutional if that statute made it a crime for a person in a motor vehicle to have mere knowledge of a weapon possessed not in any way by himself but by someone else in the car. However, this Court has clearly implied in a weapons charge case that it would be unconstitutional to allow a statute to create a mandatory presumption which eliminated the need to prove that it was a defendant himself who actually or constructively possessed the weapon found in a car also occupied by others.

Ulster County Court v. Allen, supra, 442 U.S. at 156-163. In Ulster, this Court implied that a mandatory presumption of possession would be unconstitutional because it would "undermine the fact finder's responsibility at trial . . . . to find the ultimate facts beyond a reasonable doubt" Id at 156. However, this Court ruled tht the permissive presumption actually involved in that case was constitutional since that presumption could be rejected by the jury, and the Prosecution regardless of the permisive presumption still had the burden of proving actual or constructive possession by the Defendant. Id. at 161-162.

In Ulster, it would appear that

this Court believed that the issue concerning the type of presumption was important because the element of possession to which the presumption applied was important. It would appear that if the element of possession was not constitutionally required to be in the statute, then it would be permissible to weaken the proof of that element by any means including the mandatory presumption condemned by this Court. Since this Court stated that it would not allow the element of possession to be so weakened by a mandatory presumption, then it would appear that this Court believes that a weapons charge must have an element of some type of possession which can not be weakened by means of a mandatory presumption or as in the present case

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simply but drastically eliminated altogether from the statute. In Mullaney v. Wilbur, 421 U.S. 684, 692-700, 95 S. Ct. 1881, 44 L Ed. 2d 508 (1975), this Court ruled that a legislature can not get around a problem conerning the burden of proof on an element by simply redrafting the statute without the element. The constitutionally required elements can neither be substantially weakened by means of a mandatory presumption nor drastically eliminated by means of a pen.

Even though the factual issue of possession was hotly contested in the present case, supra, pp. 9-14, it might be argued by the Prosecution that even if the jury had been instructed that the

Prosecution needed to prove that the Petitioner constructively possessed the weapon, the jury still would have convicted the Petitioner and thus the error was harmless. However

> "the offense was not so defined and appellate courts are not free to revise the basis on which a Defendant is convicted simply because the same result would likely obtain on retrial . . . . (I)t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made" Dunn v. United States, 442 U.S. 100, 107, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979).

Thus the penal statute upon which the Petitioner was convicted violated the due process clause of the Fourteenth Amendment to the United States Constitution since that statute did not require an act or omission by the

Petitioner but only required that the Prosecution prove his mere knowledge of the weapon present in the car occupied by 3 other persons. This statute which makes such a tenuous association a crime might well be the product of a fear that violent criminals armed with automatic weapons are taking over the country. However, the Constitution still requires that all penal statutes be aimed not at a general fear by the public but at a specific criminal act by a defendant. Even in a time of high crime rates, if mere knowledge can become a crime then the public majority will soon be dictating not just what crime is but what knowledge should be. The thought police of George Orwell's 1984 will soon be upon us.

The Connecticut Courts have decided an important issue of federal law by holding that the due process clause of the federal constitution permits legislatures to make mere knowledge without any action a crime. This issue has not been but should be explicitly settled by this Court. The ruling of the Connecticut courts is in conflict with the dicta and general principles enunciated by this Court in Ulster County Court v. Allen, supra, Robinson v. State of California, supra, and Scales v. U.S., supra, which imply that an act of some type of possession is a necessary element of a weapons charge. The importance of this issue is enchanced by the fact that it concerns a very common statute that will be applied to

thousands of defendants and not just this Petitioner. Prior to September 1988, this issue would have been automatically heard by this Court as an appeal since it involves a statute. As a matter of policy, this Court should still give special consideration to petitions for certiorari which involve the constituionality of statutes since such issues have an affect on countless people. Also, the present statute concerns not just guns but any weapon. Thus as the statute stands it is a crime in Connecticut to drive to a Little League game with a child who is carrying a baseball bat. Everyone in the car becomes responsible for the child with the baseball bat.

Therefore, the Petitioner prays that this Petition be granted and that

the Court grant a plenary review by which it declares said statute to be unconstitutional and orders that the Petitioner's conviction be dismissed.

THE PETITIONER,
CHARLES MEBANE

By Francis T. Mandanici

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With Whom On This
Petition Was
Joseph P. Ganim
of Bridgeport, Conn.

K. APPENDIX

TABLE OF CONTENTS

A. Connecticut Appellate Court Decision 2a

B. Connecticut Supreme Court Ruling Denying Petition For Certification 15a

C. Transcript Of Relevant Portion Of Trial Court's Jury Instruction 17a

D. Conn. Gen. Stat., Sec. 29-38 24a

E. Portion Of Petitioner's Brief To Connecticut Appellate Court Raising Federal Constitution Issue 26a

A. CONNECTICUT APPELLATE COURT

DECISION

(17 Conn. App. 243)

STATE OF CONNECTICUT V. CHARLES MEBANE

(6312)

DALY, STOUGHTON AND NORCOTT, Js.

Convicted of the crime of having a weapon in a motor vehicle, the defendant appealed to this court. Held:

1. The Defendant could not prevail on his claim, raised for the first time on appeal, that the trial court erred in instructing the jury that the state needed to provide only that the defendant knew of the presence of the weapon and not that he possessed it; that court correctly instructed the jury on

the essential elements of the offense charged.

2. The trial court did not err in denying the defendant's motion for judgment of acquittal; because his claim that the state had failed to present sufficient evidence that none of the occupants of the vehicle had a permit for the weapon was not distinctly raised at trial, this court was not required to consider it.

Argued October 21, 1988--decision released January 3, 1989

Substitute information charging the defendant with the crime of having a weapon in a motor vehicle, brought to the Superior Court in the judicial district before Zoarski, J.; verdict and

judgment of guilty, from which the defendant appealed to this Court. No error.

Francis T. Mandanici, with whom, on the brief was Joseph Ganim, for the appellant (defendant).

Jay F. Huntington, deputy assistant state's attorney, with whom was David Gold, assistant state's attorney, for the appellee (state).

DALY, J. The defendant appeals from the judgment of conviction, after a jury trial, of the crime of having a weapon in a vehicle in violation of General Statutes Sec. 29-38.[1] The Defendant claims that the trial court erred (p. 244) (1) in instructing the jury that the state need prove only the defendant's knowledge of the weapon's

presence and not that the defendant had or possessed it, and (2) in failing to grant his motion for judgment of acquittal.

The jury could reasonably have found the following facts. On December 7, 1986, at approximately 1 a.m., Officers Philip Beamon and Vincent Raucci of the New Haven police department observed a motor vehicle parked with its engine running in the middle of Winchester Avenue. The Defendant, who was the operator of the vehicle, blocked traffic in both directions as he conversed with several females standing across the street. The officers approached the vehicle and Beamon asked the defendant for his license and registration. Beamon informed the defendant that he would be

issued a summons for improper parking. The defendant acted nervous when Beamon spoke to him. Raucci stood behind the vehicle and watched the three male passengers in the defendant's vehicle in order to cover Beamon.

While standing outside the driver's door and writing the summons, Beamon observed the defendant reach between his legs toward the floor. In order to get a better look into the compartment, Beamon shone his flashlight into the car. He then observed what appeared to be a gun handle on the floor of the car. Beamon yelled to Raucci that there was a gun in the car. The officers drew their weapons and ordered the occupants to put their hands in plain sight. After the defendant was ordered to get out of the car, Beamon searched the floor area of

the driver's seat and found a fully loaded, operable .38 caliber snub-nosed revolver. The gun was located far enough into the driver's floor (p. 245) area that Beamon did not have to reach underneath the seat to retieve it. The Defendant and the three passengers, Dennis Broadnax, Anthony Smalls and Darrell Banks, all were arrested.

The defendant's first claim is that the trial court erred in its instruction on the offense of weapons in vehicles. He claims that the language "knowingly has" as set forth in the statute, means "knowingly possesses" and, therefore, that the court erred when it failed to instruct the jury as to either actual or constructive possession. He further claims that the erroneous instruction violated his constitutional rights

because the state was relieved of proving an essential element of the offense. Although the defendant took no exception to the instruction he now challenges, we will review his claim under the "exceptional circumstances" rule of State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973), since the claim involves the constitutional right to proof of guilt beyond a reasonable doubt. State v. Price, 205 Conn. 616, 619, 534 A.2d 1196 (1987).

When construing a statute, we use common sense and assume that the legislature intended to accomplish a reasonable and rational result. State v. Rogue, 190 Conn. 143, 151, 460 A.2d 26 (1983). "In determining the meaning of statutory language, this court must read a statute as a whole." State v.

Williams, 206 Conn. 203, 210, 536 A.2d 583 (1988).

Against the above standards, we determine that General Statutes Sec. 29-38 makes it illegal for any person knowingly to have in any vehicle any weapon without a legal permit. While penal statutes are to be construed strictly, strict construction "does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent." State v. Roque, supra. "The clear intent of (Sec. 29-38) is (P. 246) to make it a crime to have a weapon in a motor vehicle . . . ." State v. Peterson, 13 Conn. App. 76, 87, 534 A.2d 1237 (1987). The statute is not concerned with

possession or ownership of a weapon, but rather aims to penalize those who know that there is a weapon inside a motor vehicle. To read the requirement of possession into the statute would unneccesarily limit the scope of the statute. Such an interpretation would also render the statute redundant because General Statutes Sec. 29-35 makes it illegal for any person to carry a pistol or revolver without a permit. We decline to interpret Sec. 29-38 in a way that would thwart its purpose and render the statute unworkable. We conclude that the trial court correctly charged the jury on the essential elements of the offense of having a weapon in a motor vehicle.

The defendant's second claim is that the trial court erred when it

failed to grant his motion for judgment of acquittal. Specifically, he claims that the state failed to present sufficient evidence that none of the occupants of the vehicle had been issued a proper permit for the weapon.

In State v. Smith, 9 Conn. App. 330, 338, 518 A.2d 956 (1986), we noted that the lack of a proper permit is an essential element for a violation of General Statutes Sec. 29-38 that the state must prove beyond a reasonable doubt. Moreover, the state must prove that no one in the vehicle had a proper permit to carry the weapon.

During trial, the state produced two witnesses to prove that none of the occupants had a permit to carry a weapon. Sergant Francis Whelan of the

Connecticut state police testified that, from his review of the state records, none of the occupants had been issued a state gun permit. Officer John Esposito of the New Haven police department testified that from his review (p. 247) of the city records, neither the defendant, nor Smalls nor Bank had a city gun permit. When asked whether Broadnax had such a permit, Esposito responded "No, I haven't".[2]

While this is unquestionably an ambiguous statement, a review of the entire proceedings indicates that both the defendant and the state viewed Esposito's response as indicating that Broadnax had not been issued a local gun permit. The Defendant did not cross-examine Esposito on his answer. Moreover, the defendant's motion for

judgment of acquittal was based on the state's failure to prove his knowledge of the presence of the weapon, and did not rely on the alleged failure to prove that Broadnax did not have a local gun permit. The ground claimed on appeal was not distinctly presented to the trial court as required by Practice Book Sec. 288. We are not bound to consider it here. State v. Bradley, 12 Conn. App. 163, 167-68, 529 A.2d 1343, cert. denied, 205 Conn. 810, 532 A.2d 77 (1987). The trial court did not err in denying the motion for judgment of acquittal.

There is no error.

In this opinion the other judges concurred.

Footnotes

1 General Statutes Sec. 29-38 provides in part: "Any person who knowingly has, in any vehicle owned, operated or occupied by him, any weapon for which a proper permit has not been issued as provided in section 29-28 or section 53-206, or has not registered such weapon as required by section 53-202, as the case may be, shall be fined not more than one thousand dollars or imprisoned not more than five years or both . . . ."

2 This answer was verified by the court reporter.

B. CONNECTICUT SUPREME COURT RULING DENYING PETITION FOR CERTIFICATION

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-88-1131

State of Connecticut

v.

Charles Mebane

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (17 Conn. App. 243) it is hereby ordered

that said petition be, and the same is hereby denied.

BY THE COURT,

/s/ Cynthia M. Gworek
Assistant Clerk-Appellate

Dated: February 9, 1989

C. TRANSCRIPT OF RELEVANT PORTION OF TRIAL COURT'S JURY INSTRUCTION

CR6-267286	SUPERIOR COURT
STATE OF CONNECTICUT	JUDICIAL DISTRICT OF NEW HAVEN
V.	AT NEW HAVEN
CHARLES MEBANE	JUNE 19, 1987

(Transcript p. 301)

****

The term weapon, is defined within the statutes to include any pistol or revolver. And furthermore, the State must prove that the Defendant knowingly carried such a weapon in a motor vehicle which was either operated or occupied by him, and that there was a weapon for which a proper permit or registration had not been issued. That is, no permit

or registration had been issued by any of the authorities, which would have issued it to the Defendant.

Now, the statute makes reference to the fact that the person has, or knowingly has a weapon in the vehicle. Now, that term knowingly has no technical meaning. It is a word used in daily speech, and in its common usage should be applied here. However, it is worthy to note that the word has -- does not necessarily mean that one must have the weapon upon his person, or even within his reach. The word has little at all to do with the concept of physical possession, because under the statute, a jury could find that a person has a weapon in a vehicle even when the weapon (Transcript p. 302) is owned by or even in the physical possession of

another occupant of the vehicle. However, I must tell you that the statute pertains only to a person who knowingly has a weapon in the vehicle. And in order to find this Defendant guilty of the charge here, you must find not only that the weapon was in the vehicle, but also that the Defendant was aware of its existence within the vehicle.

On the other hand, in order to find the Defendant guilty, you need not find that the Defendant was in actual possession of the weapon, or that he was the owner, or the initial carrier of the weapon. The question you should ask your self is, was the Defendant aware of the fact that the weapon was in the vehicle? And in resolving this question, you should consider all of the

evidence that you have before you, and any and all reasonable and logical inferences that you may draw from the evidence.

Now, as to the statute itself, it refers to any person who knowingly has in a vehicle operated, or occupied by him. So, in order to find the Defendant guilty, you must find that (Transcript p. 303) that he was either the operator or an occupant of the vehicle which was involved at the time of the incident.

If you have determined that the object which was involved here fits the definition of weapons based on the evidence that you have heard, then you must then go on to determine whether the weapon is one for which a permit has been issued. And you are instructed

that under our law, the State must prove beyond a reasonable doubt that no one present in the vehicle at the time of the seizure of the vehicle had a valid permit to carry the weapon.

In other words, it is not enough for the State to show that the Defendant did not have a permit. The State must also show that the other occupants of the vehicle also did not have a valid permit.

Now, by a valid permit, I mean one issued by the police department in the city in which the weapon is carried, and in this case, in the city of New Haven, or one issued by the State Police Department. If you find that the Defendant, or any of the other individuals in (Transcript p. 304) the

vehicle at the time of this incident, had not been issued a permit by either the New Haven Police Department, or the Connecticut State Police Department, then you may then find that the Defendant was guilty of this offense charged.

However, if you find beyond a reasonable doubt that neither the Defendant nor any of the other persons in the vehicle had any such permit, then you would be required to return a verdict of guilty, if you had likewise found all the other elements of the crime as I have explained them to you, have been proven beyond a reasonable doubt.

As often occurs in a criminal prosecution, testimony has been

presented in this case that if found credible by you, tend to show that a person, in addition to the Defendant, may also have been involved in some criminal activity, regarding this particular weapon. Now, this is not usual, particularly where, as here, the statute at issue is violated by any occupants of a vehicle, who are aware of the existence of a weapon in the vehicle.

However, as I'm sure you recognize, the . . . .

D. CONNECTICUT GENERAL. STAT.,

Sec. 29-38

Any person who knowingly has, in any vehicle owned, operated or occupied by him, any weapon for which a proper permit has not been issued as provided in section 29-28 or section 53-206, or has not registered such weapon as required by section 53-202, as the case may be, shall be fined not more than one thousand dollars or imprisoned not more than five years or both, and the presence of any such weapon in any vehicle shall be prima facie evidence of a violation of this section by the owner, operator and each occupant thereof. The word "weapon" as used in this section, means any pistol or revolver, any dirk knife or switch knife

or any knife having an automatic spring release device by which a blade is released from the handle, having a blade of over one and one-half inches in length, and any other dangerous or deadly weapon or instrument including any slung shot, black jack, sand bag, metal or brass knuckles, stiletto, any knife, the edged portion of the blade of which is four inches or over in length or any martial arts weapon as defined in section 53a-3. The provisions of this section shall not apply to any person enrolled in and currently attending a martial arts school, with official verification of such enrollment and attendance, having any martial arts weapon including, but not limited to, nunchaku and Chinese stars in a vehicle while traveling to and from such school.

E. PORTION OF PETITIONER'S BRIEF TO CONNECTICUT APPELLATE COURT RAISING FEDERAL CONSTITUTIONAL ISSUES, FILED JANUARY 29, 1988

(Appendix References Are To The State Court Brief)

page 8

/****The trial court's instructions tracked the Prosecutor's request for instructions and argument. The court instructed the jury that the Prosecutor need not prove that the weapon was on the Defendant or even within his reach or possessed by him. The court instructed the jury that the Defendant could still be guilty even if the gun was in the physical possession of another occupant. The court instructed the jury that the Prosecution need only prove that the Defendant was aware that there was a weapon in the car (T. pp. 301-302, 304, App. pp. 29a-32a).

The Defendant took an exception to the court's charge regarding the fact that the court did not instruct the jury

pursuant to his written request that the Prosecution needed to prove that the Defendant "knowingly had a weapon in the motor vehicle he was operating and occupying. Knowingly is defined as willfully, consciously or intentionally" (App. p. 18a, T. p. 312).

It would have been more prudent for the Defendant to have been more explicit in his request and exceptions regarding the need for the Prosecution to prove as elements of the charge not only that the Defendant knew of the weapon but also had it or possessed it to some degree. Since

said exception was not / perfectly explicit, then caution dictates that this issue regarding the court's failure to instruct on an element of the charge, be raised under the principles of State v Evans 165 Conn. 61, 70, 327 A2d 576 (1973). Evans holds that an issue not

raised at trial can be raised on appeal if "the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and fair trial."

Regarding the record prong of Evans, the factual record in the present case is clear that it was uncertain whether the Defendant ever possessed the weapon. There was a 'suspicious' move but no fingerprints or direct evidence of possession (T. pp. 152, 210-213, 233-234). The record is also clear that the Prosecution strenuously argued to the jury, and the court instructed the jury, that no type of possession was required to prove the Defendant guilty. The Prosecutor and trial court told the jury that the only element was whether the Defendant knew the weapon was in the car

(T. pp. 262-263, 279-280, 301-302, 304 App. pp. 20a-21a, 26a-27a, 29a-32a).

Regarding the second or constitutional prong of Evans, the claim in the present case that the court erred in failing to instruct the jury on the element of having or possessing the weapon to some degree is clearly a claim involving the denial of a fundamental constitutional right. In State v Frederick Payne, 12 Conn. App. 408, 411-413, 530 A2d 1110 (1987), this Court cited State v Griffin 175 Conn. 155, 162-163, 397 A2d 89 (1978) and held that it is constitutionally required under principles of due process that a trial court instruct the jury on all the elements of a crime. In Payne, the issue

of a lack of instructions on an element was not raised at trial but this Court conducted an Evans review and ordered a

new trial due to such a faulty instruction.

In State v Hill, 201 Conn. 505, 511-517, 523 A2d 1252 (1986), an Evans review was conducted regarding the trial court's instructions on the element of possession even though defense counsel had never suggested that the "court had not accurately defined the word 'possession'," Id at 512. The Supreme Court held that under the due process clauses of the Fourteenth Amendment to the United States Constitution and Article First, Section 8 of the Connecticut Constitution (App. pp. 3a-4a), a defendant has a fundamental constitutional right "to be acquitted unless proven guilty of **each element** of the charge beyond a reasonable doubt....(and) that a claim like the one here that the judge **improperly**

instructed the jury on an element of the offense is appealable even if not raised at trial. (citations omitted)." Id at 512-513 (emphasis added).

In State v Price, 205 Conn. 616, 619, A2d (1987), our Supreme Court recently noted that an Evans review is required when a defendant claims for the first time on appeal that the trial court's jury instruction relieved the Prosecution of its burden of proving an essential element of the offense.

In addition to said constitutional rights of due process, the instructions in the present case violated the Defendant's constitutional rights to a jury trial since he was convicted without a jury ruling on an essential element of the charge. See State v Gabriel, 192 Conn. 405, 414, 473 A2d 300 (1984), State v Frederick Payne, supra, 12 Conn. App.

at 413, the Fifth, Sixth, and Four-teenth Amendments to the United States

Constitution, and Article One, Sections 8 and 19 of the Connecticut Constitution (App. pp. 3a-4a).

Thus the present case qualifies for an Evans review. The present case also meets all four (4) qualifications for an Evans review mentioned in State v Foshay, 12 Conn. App. 1, 23, 530 A2d 611 (1987). The issue 1) by its terms involves a fundamental constitutional issue, 2) is truly of constitutional proportions, 3) there is a record showing a deprivation of those constitutional rights, and 4) that deprivation denied the Defendant a fair trial. The first two (2) criteria are met because the issue involves the constitutional right to have the jury charged on all elements. The second two (2) criteria are met because the record

shows no instructions on an element. Without such instructions there is no fair trial since a fair jury trial involves the jury ruling on all the elements.

Furthermore, since all the qualifications for an Evans review are met, then the Defendant is entitled to a full appellate review on the merits of his claim. See State v Robinson, 204 Conn., 207, 210, 527 A2d 694 footnote 4 (1987).

The element which the trial court misconstrued was the part of Conn. Gen. Stat., Sec. 29-38 (App. p. 6a) which states that "Any person who knowingly has in any vehicle owned, operated, or occupied by him any weapon...." is guilty of a criminal offense. The Prosecution and trial court interpreted said statue as only requiring the Prosecution to

prove that a defendant "has knowledge" of the weapon. The Defense interprets said statute literally as requiring the Prosecution to prove that a defendant "knowingly has" the weapon or possesses it to some degree. Since it might be argued that such different interpretations of a statute can be in accord with "ordinary usage," see Liparota v U.S., 471 U.S. 419, 105 S.Ct. 2084, 2087, 2088, 85 L.Ed. 2d 434 (1985), then it is necessary to first review both procedural principles of statutory construction and substantive principles of constitutional law prior to deciding whether the trial court's interpretation was constitutional.

2. Principles of Statutory Construction

Where "a statute permits two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted, even where it is not the obvious one," Engle v Per-sonnel Appeal Board, 175 Conn. 127, 134, 394 A2d 731 (1978), Moll v Giannetti, 8 Conn. App. 50, 54, 510 A2d 1009 (1986). Thus if a statute can be interpreted by common usage in two different ways but only one of which is constitutional then the statute must cnly be given the constitutional interpretation.

Furthermore, statutes must be interpreted not only in accord with the constitution but also generally in accord with the common law. Although legislatures can specifically enact laws in derogation of the common law, State v

Husser, 161 Conn. 513, 515, 290 A2d 336 (1971), it is

> "an established rule of statutory construction that statutes are not readily interpreted as abrogating common law rights (citation omitted). It is also a rule of statutory construction that statutes in derogation of common law are to be strictly construed (citations omitted). No statute is to be construed as altering the common law farther than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express (citation omitted)" State v Nugent, 199 Conn. 537, 548, 508 A2d 728 (1986). /page 13

Also, not only must statutes be strictly construed to be in accord with common law, but even when a penal statute does not touch on common law, it still "must be strictly construed." See State v Edwards, 201 Conn. 125, 132, 513 A2d 669 (1986). "Criminal statutes are not to be read more broadly than their

language plainly requires and ambiguities are ordinarily to be resolved in favor of the Defendant" State v McGann, 199 Conn. 163, 177, 506 A2d 109 (1986). "(A)mbiguity concerning the ambit of criminal statute should be resolved in favor of lenity" Liparota v U.S., supra, 105 S.Ct. at 2089.

Furthermore, "(e)very word in a legislative enactment is presumed to have meaning," State v Freedom of Information Commission, 184 Conn. 102, 107, 441 A2d 53 (1981). "No part of a legislative enactment is to be treated as insignificant...." DeFonce Construction Corp. v State, 198 Con. 185, 187, 501 A2d 745 (1985). However, the meaning to be given is the common meaning. A "court will not torture words to import ambiguity where the ordinary meaning leaves no room for

ambiguity, and words do not become ambiguous simply because lawyers or laymen contend for different meanings." Rosnick v Aetna Casualty and Surety Co., 172 Conn. 416, 422, 374 A2d 1076 (1977). "It is not necessary to define words which are commonly used and which are defined in our standard dictionnaries. The definition of words in our standard dictionnaries is taken as a matter of common knowledge...." State v Lewtan, 5 Conn. App. 79, 85, 497 A2d 60 (1985). "Where a statute does not define a term it is appropriate to look to the common understanding expressed in the law and dictionnaries." / Caldor Inc. v Hefferman, 183 Conn. 566, 570-571, 440 A2d 767 (1981). "While (the word in question) is not defined in the penal code, it is in common usage defined....by Webster Third New Inter-

national Dictionnary and....by the New College Edition of the American Heritage Dictionnary." State v Diorio, 12 Conn. App. 74, 89, 529 A2d 1320 (1987).

3. Principles of Constitutional Law and Common Law

In addition to these procedural principles of statutory construction, there are a few substantive principles of constitutional law and common law which must be kept in mind when construing statutes. Under "common law," there is no crime unless there is the "coupling of the evil meaning mind with the evil doing hand...." State v Husser, supra, 161 Conn. at 515, U.S. v Bailey, 444 U.S. 394, 402, 100 S. Ct. 624, 630-631, 62 L.Ed. 2d 575 (1980), Wharton's Criminal Law, 14th Edition, Vol. 1, Chap. 3, p. 115, LaFave and Scott, Substantive Criminal Law, Chap. 3, Sec. 3.2(b), p. 273. Thus under

common law, a crime has two (2) components--a mental state and an act which is a product of that mental state.

The mental state is usually one described as "mens rea." See LaFave and Scott, supra, Sec. 3.4, pp. 296-302. "The existence of a mens rea is the rule, rather than the exception to the principles of Anglo-American jurisprudence." State v Gabriel, supra, 192 Conn. at 411, Liparora v U.S., supra, 105 S. Ct. at 2088, U.S. v Bailey, supra, 444 U.S. at 404, 100 S.Ct. at 631, n.4. Mens rea is defined as a "guilty mind, a guilty or wrongful purpose, a criminal intent. Guilty knowledge and wilfullness," Black's Law Dictionnary. The mental element usually requires some "fault" on part of the defendant since "punishment without fault conflicts with the principles of

Anglo-American jurisprudence except for a small class of regulatory offenses," State v Truppi, 182 Conn. 449, 454, 438 A2d 712, footnote 3 (1980).

It is axiomatic that legislatures can enact strict liability statutes which in derogation of the common law do not require a mens rea or evil meaning mind. State v Husser, supra, 161 Conn. at 515. However, "usually but not always, the statutory crime without fault carries a relatively light penalty--generally of the misdemeanor variety," LaFave and Scott, supra, Sec. 3.8, pp. 340-341.

> "Strict liability is generally inappropriate when the offense is punishable by imprisonment or other severe sanction. United States v Gypsum Co., 438 U.S. (422), 442, n. 18, 98 S. Ct. (2864) 2876, (57 L. Ed. 2d 854 (1978), United States v Freed, 401 U.S. (601) 613, n. 4, 91 S. Ct. (1112) 1120, (28 L.Ed. 2d 356) (1971), Brennan J. concurring), Morrisette v

United States, 342 U.S. (246) 256, 72 S. Ct. (240) 246, (96 L. Ed.288) (1952)" U.S. v Anton, 683 F2d 1011, 1016-1017 (CA 7, 1982).

In U.S. v Bailey, supra, 444 U.S. at 404, 100 S.Ct. at 631, n. 4, in noting that strict liability crimes are exceptions to the general rule that criminal liability requires an evil meaning mind, the Court further noted that under the Model Penal Code, the only offenses based on strict liability are "violations, actions punishable by a fine, forfeiture, or other civil penalty rather than imprisonment." In Moll v Giannetti, supra, 8 Conn. App. at 53, this Court noted in a different context, that it is a "basic concept of our system that legal burdens should bear some relationship to individual responsibility and wrongdoing."

/ It should be noted that a general mental state concerning a gun would not necessarily involve an evil state of mind or mens rea in Connecticut. Guns are not matters which are malum per se. "In Connecticut, there is no blanket prohibition against carrying or possessing a pistol," State v Beauton, 170 Conn. 234, 242, 365 A2d 1105 (1976). In fact, Article First, Section 15 of the Connecticut Constitution states that "Every citizen has a right to bear arms in defense of himself and the state." See also the Second Amendment to the United States Constitution (App. p. 3a). This state constitutional right has been described as a "fundamental right" which is entitled to due process protection. Rabbit v Leonard, 36 Conn. Supp. 108, 112, 413 A2d 489 (1979). Thus to constitute the required mens rea or

guilty mind under common law, a statute would require a mental state more focused on doing something with the gun, such as controlling it, rather than merely knowing about it.

As mentioned earlier, in addition to a mens rea, a statute to pass constitutional scrutiny must describe the act that is being prohibited. However, the act must be more than a relationship.

> "In our jurisprudence, guilt is **personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity...., that relationship must be sufficiently substantial** to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." Scales v U.S., 367 U.S. 203, 224-225, 81 S. Ct. 1469, 1484, 6 L.Ed.2 782 (1961) (emphasis added).

The Court in Scales noted that there must be an

page 17

/ "analysis of the relationship between the fact of membership and the **underlying substantive illegal conduct**, in order to determine whether that relationship is indeed too **tenuous** to permit its use as the basis of criminal liability....What must be met then, is the argument that membership, **even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation** in the organization's criminal activity...." 367 U.S. at 226, 227, 81 S. Ct. at 1485 (emphasis added).

The Court noted that in

"an area of the criminal law which this Court has indicated more than once demands its watchful scrutiny (citations omitted), these (above) factors have weight and must be found to be overborne in a total constitutional assessment of the statute. We think, however, they are duly met when the statute is found to reach only '**active**' members having also a **guilty**

> **knowledge and intent**, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise unaccompanied by any **significant action** in its support or any committment to undertake such action," 367 U.S. at 228, 81 S. Ct. at 1485-1486 (emphasis added).

It has been observed that "Scales thus teaches that **knowing association** with a group **cannot** be made a punishable **act** just because some of the group members are engaged in **criminal conduct**," Sawyer v Sandstrom, 615 F2d 311, 317 (CA 5, 1980) (emphasis added).

Stated in another way, "mere presence at the scene of the crime, even coupled with the knowledge that a crime was being committed there, is not sufficient to establish guilt of a conspiracy. See State v Vessichio (197 Conn. 644) 656-657 (500 A2d 1311

(1985)), United States v Soto, 716 F2d 989, 991 (2d Cir. 1983); see also United States v Johnson, 513 F2d 819 (823-824) (2d Cir. 1975)." State v Stellato, 10 Conn. App. 447, 454, 523 page 18/ A2d 1345 (1987). "Presence alone unilluminated by other facts is insufficient proof of possession," State v Watson, 165 Conn. 577, 596, 345 A2d 532 (1973).

It is possible that a statute can be constitutional which prohibits not an action but a failure to act--such as a failure to leave a vehicle when one realizes that another party possesses a weapon. However, for "criminal liability to be based on a failure to act, it must first be found that there is a duty to act--a legal duty and not simply a moral duty," LaFave and Scott, supra, Sec. 3.3(a), p. 283. Naturally

this duty to act must be expressed in some law for it to rise to a legal duty. When no such duty is expressed in law then courts have no authority "for interpolating into a criminal statute a requirement that does not exist," State v Duhan, 194 Conn. 347, 358, 481 A2d 48 (1984). Courts can not add to statutes. See Doe v Manson, 183 Conn. 183, 186-188, 438 A2d 859 (1981).

Also, it is important to note that although legislatures can enact strict liability statutes which clearly eliminate the mens rea component of a crime, legislatures can not constitutionally eliminate the action or omission component of a crime.

> "Bad thoughts alone cannot constitute a crime, there must be an act, or an omission to act where there is a legal duty to act. Thus the **common law crimes are defined in terms of act or omission to act, and statutory**

> **crimes are unconstitutional unless so defined**....The common law crimes all require an act or omission in addition to a bad state of mind. A **statute** purporting to make it criminal **simply to think bad thoughts** would in the United States be held **unconstitutional**. And a statute which is worded vaguely on the question of whether an **act** (or omission), in addition to a state of mind, is required for criminal liability will be con-strued to require some act (or
page 19/ omission)" LaFave and Scott, supra, Sec. 3.2, 3.2(b), pp. 272-274 (emphasis added).

4. Connecticut General Statute, Section 29-38

With these procedural and substantive constitutional and common law principles in mind, a thorough review of the statute can be made in order to ascertain whether the trial court's interpretation was unconstitutional. It should first be noted that Joanne Tarza of the Connecticut State Library (phone # 566-

4601) has indicated to undersigned counsel that there is no recorded legislative history of Conn. Gen. Stat., Sec. 29-38. Said statute was first enacted in 1935 prior to when the full record of all legislative floor proceedings were made. The record of the more current legislative history only relates to the definition of the word weapon.

In its fourth word, the statute (App. p. 6a) quickly reveals that it is not a statute of strict liability since it requires that a defendant "knowingly" do something. Thus, the statute follows the common law by providing a mens rea component.

Also, the statute quickly reveals that it requires a defendant to commit an act in order to be guilty of the offense. The statute makes it a crime

when a defendant knowingly has a weapon in a vehicle. Nowhere does the statute even imply that it is a crime for a party to fail to leave a vehicle once he knows a weapon is in the vehicle.

The statute focuses on the words that it is a crime when any person "knowingly **has**....any weapon" (emphasis added). The word 'has' is the present tense, third person singular of the word "have." Webster's Third International Dictionnary; The American Heritage Dictionnary of the English Language. The word 'have' is defined as

> "1a: to hold in **possession** as property: own....b: to **hold**, keep or retain esp. in one's use, service, regard or affection or at one's disposal....d: **carry**, bear support....4a(1): to **acquire or get possession** of; obtain....(3) to be able to avail oneself of or utilize....**Syn, HOLD, OWN, POSSESS, ENJOY:** HAVE is a

> very general term indicating any condition or action of **control**, retaining, keeping, regarding, or experiencing as one's own...." Webster's Third International Dictionnary (emphasis added).

The word have is similarly defined as meaning "1. to be in **possession** of, as one's property; **own**,...." The American Heritage Dictionnary of the English Language (emphasis added). The total definition of the word 'have' in Black's Law Dictionnary, Special Deluxe Fifth Edition is "Imports **ownership**, and has been defined to mean 'to **keep**,' 'to **hold in possession**,' 'to **own**,' 'to bear (children)" (emphasis added). Rogers College Thesaurus succinctly defines the word 'have' as meaning "**own**, **hold**, **retain**, **possess**, **keep**, **maintain**. **See Possession**" (emphasis added).

Furthermore, in State v Watson, supra, 165 Conn. at 596, our Supreme Court in discussing this very statute used the word "possession." In State v Peterson, 13 Conn. App. 76, ___ A2d ___ (1987), headnote #4 in discussing this statute used the word possession.

It is not necessary for a statute to use the word 'possess' rather than the word 'has' since the words are synonyms to each other. The word 'possess' certainly has no monopoly on the thought it conveys. A "word.... is the skin of a living thought...." Struckman v Burns, page 21 205 Conn. 542, 555, ___ A2d ___ (1987). Certainly the legislature can use synonyms to express the same thought. It is important to remember that the present statute was enacted by the 1935 legislature and not by the 1969 legislature which enacted the more

expansive penal statute which more readily uses the word possess. See Conn. Gen. Stat., Sec. 53a-3(2).

Also, the word 'has' or 'possess' certainly does not denote exclusive possession. It is quite clear that the statute prohibits the type of joint possession that was discussed in State v Gabriel, supra, 192 Conn. at 422-423.

5. Conclusion

Thus, a thorough review of the law and a close review of the statute reveals that it contains the element that a defendant must have or possess the weapon to some degree. Therefore, the trial court's instructions, which eliminated this element and clearly stressed that only knowledge need be proved (T. pp. 301-302, 304, App. pp. 29a-32a) were unconstitutional. Said instructions violated the Defendant's

rights to due process and to a jury trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article First, Sections 8 and 19 of the Connecticut Constitution (App. pp. 3a-4a). *****
**** page 35

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